

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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State of Oklahoma, et al.,	)	
	)	
	)	05-CV-0329 GKF-SAJ
Plaintiffs,	)	
	)	
v.	)	
	)	
Tyson Foods, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

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**THE CARGILL DEFENDANTS' RESPONSE IN OPPOSITION TO  
PLAINTIFFS' MOTION TO COMPEL THE CARGILL DEFENDANTS TO MAKE  
A KNOWLEDGEABLE 30(B)(6) DEISGNEE AVAILABLE FOR DEPOSITION**

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KNOWLEDGEABLE 30(B)(6) DESIGNEE AVAILABLE FOR DEPOSITION**

Plaintiffs move the Court to compel Cargill, Inc. and Cargill Turkey Production, LLC (the "Cargill Defendants") to designate a witness pursuant to Federal Rule of Civil Procedure 30(b)(6) to testify "regarding the scope of the search and the nature of [the Cargill Defendants'] document production." (Pls.' Mot. Compel at 1.) However, Plaintiffs' motion to compel must be denied for both procedural and substantive reasons.

Procedurally, Plaintiffs have never served the Cargill Defendants with notices satisfying the requirements of Rule 30(b)(6). Rather, Plaintiffs' notices for records custodian depositions are issued pursuant to Rule 30(b)(1). (*See* Pls.' Mot. Compel Exs. A, B.) As discussed in more detail below, the distinguishing factor between these two types of notices is that in a Rule 30(b)(1) notice, the **requesting** party identifies the persons or categories of persons to be deposed. On the other hand, in a Rule 30(b)(6) notice, the requesting party merely specifies with particularity the topics to be discussed during the deposition, and the **responding** party designates the persons or categories of persons to respond to the listed topics. In the notices

currently at issue, Plaintiffs identified “custodian(s) of records” as the category of persons to be pursued, squarely placing the notices in the scope of Rule 30(b)(1).

In response to the Rule 30(b)(1) notices, the Cargill Defendants have already produced for deposition Brenda Roe, one of the custodian of records for the Feed Mill located in Springdale, Arkansas which is currently operated by Cargill Turkey Production, LLC and formerly operated by Cargill, Inc. (Pls.’s Mot. Compel Ex. C at P.15, Lns. 4-10; P.17, Ln. 25 – P. 18, Ln. 1; and P.19, Ln.8 – P.20, Ln.16.) Additionally, the Cargill Defendants have offered for deposition the following custodians of records:

- Tim Alsup, Flock Serviceperson, Springdale, AR
- Gary McGarrah, Feed Mill Manager, Springdale, AR
- Katie Teel, Ag Assistant, Gentry, AR
- Bobbi Devor, Breeder Flock Supervisor, Gentry, AR
- Richard Burr, Information Protection Coordinator and IT Resource Manager (ESI Custodian), Wichita, KS
- Dennis Fulbright, Control (ESI Custodian), Wichita, KS.

Although the Cargill Defendants continue to offer to present these remaining records custodians for deposition, Plaintiffs have steadfastly refused to pursue these depositions.

Moving beyond procedural deficiencies, Plaintiffs’ motion to compel also fails substantively were the Court to assume for purposes of argument that Plaintiffs had properly served the Cargill Defendants with Rule 30(b)(6) notice. Not only does the motion seek information outside the realm of discovery permitted under the Federal Rules of Civil Procedure, it also seeks information that constitutes staunchly protected litigation and opinion work product as well as attorney-client privileged communications. However, Plaintiffs’ deposition notices do not seek information allowed under Rule 26(b)(1) regarding the “existence, description, nature, custody, condition and location” of the documents possessed by the Cargill Defendants that are

responsive to the Plaintiffs' discovery requests. Instead, the focal point of the Plaintiffs' purported Rule 30(b)(6) notices is the manner in which the Cargill Defendants **searched** for and **produced** documents they deemed responsive to the discovery requests. Nothing in the processes undertaken by the Cargill Defendants to identify, collect, and produce responsive documents is relevant to the claim or defense of any party in this environmental litigation, nor are those processes particularly relevant to whether responsive documents actually exist or where said documents are located.

Even if the process to identify, collect, and produce responsive documents were tangentially relevant, they are privileged because, as Ms. Roe testified in her deposition, the process of collecting and producing responsive documents was conducted exclusively by the Cargill's Defendants legal counsel. (*Id.* at P. 77, Lns. 14-22; P. 78, Ln. 18 – P. 79, Ln. 4; and P. 102, Lns. 9-11) Requiring the Cargill Defendants to designate persons (whether attorneys involved in the process or non-attorneys imbued with knowledge of the process) capable of testifying to the mental impressions, strategies, opinions, and efforts of legal counsel to respond to Plaintiffs' discovery requests would impermissibly breach the work product doctrine and attorney-client privilege. Moreover, Plaintiffs have not demonstrated a *substantial need* for a deposition that would violate these privileges. As the Cargill Defendants have repeatedly reminded Plaintiffs' counsel since the dispute over the alleged Rule 30(b)(6) notice began, if Plaintiffs' goal is to identify the universe of documents possessed by the Cargill Defendants that are responsive to their discovery requests and to ascertain whether these documents have, in fact, been produced, there are methods to achieve this goal that are less intrusive. Plaintiffs offer no argument or analysis to support production of work product, much less proof sufficient to meet the high production requirements.

Additionally, Plaintiffs have no practical need for the deposition they seek because the Cargill Defendants have already provided ample information regarding the scope and nature of their document search. First, in addition to producing documents in the ordinary course of business, as a matter of courtesy for each production the Cargill Defendants identified the general categories of documents being produced. (Ex. A). Second, the Cargill Defendants produced Brenda Roe for deposition, identified additional custodians, and offered to produce whatever specific custodian Plaintiffs may need to depose. Finally, the Cargill Defendants provided Plaintiffs with detailed source information for each document produced in the six document productions. (Ex. B: June 5, 2007 letter from D. Mann to R. Garren.) The Cargill Defendants gave Plaintiffs an intricate spreadsheet identifying each of the more than 80,000 documents produced by 1) Bates number, 2) source folder name, 3) custodian, 4) description. Further, the spreadsheet even identified to which specific discovery requests the document responds.<sup>1</sup>

### **ARGUMENT AND AUTHORITIES**

The motion to compel fails because it demands a deposition that Plaintiffs have never noticed, seeks irrelevant information outside the scope of permissible discovery, and is designed to yield highly protected litigation and opinion work product and attorney-client privileged communications.

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<sup>1</sup> An exemplary page of that spreadsheet is attached to Ex. C to this response.

# **I. PLAINTIFFS' MOTION FAILS PROCEDURALLY.**

Plaintiffs attempt to disguise their Rule 30(b)(1) deposition notice as a 30(b)(6) notice and morph their request to depose custodians of records knowledgeable about responsive documents into a demand for corporate designees on the methods utilized to search for and produce responsive documents. Rule 30(b)(1) states, in pertinent part (emphasis added):

A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing . . . . The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, **if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.**

The deposition notices served by the State upon the Cargill entities specifically stated:

You are hereby notified that pursuant to Rule 30 of the Federal Rules of Civil Procedure Plaintiff will take the oral deposition of the **Custodian of Records** for Cargill . . . . The deposition is being taken for the purpose of **discovery of all of the records and documents described in Plaintiff State of Oklahoma's July 10, 2006 Set of Requests for Production** to Cargill . . . requests numbered 1 through 125 . . . .

(Pls.' Mot. Compel Exs. A-B, emphasis added.) As described in various correspondence to Plaintiffs from the Cargill Defendants, (*see, e.g.* Ex. D: Mar. 16, 2007 letter from D. Mann to R. Garren), given the far-reaching nature of the documents described in Plaintiffs' document requests, there are several "custodians of records" able to discuss responsive documents. Pursuant to Rule 30(b)(1), the Cargill Defendants named for Plaintiffs records custodians who could identify available responsive documents and other records custodians who might also have relevant information. (Ex. E at 2: Mar. 14, 2007 letter from D. Mann to R. Garren.)

Because Plaintiffs' notices meet the requirements of Rule 30(b)(1) but not 30(b)(6), the Cargill Defendants did not "designate" organizational representatives to discuss Plaintiffs'

document requests per se. Rule 30(b)(6) requires that the notice of deposition “describe with reasonable particularity the matters on which examination is requested” of an organization and that “the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf.” One of the primary distinctions between Rules 30(b)(1) and 30(b)(6) is that, in the former, the party requesting the deposition identifies the name or group of person to be deposed whereas, in the latter, the responding entity designates the person or group of persons to testify on behalf of the entity.

In one of the few authorities provided in Plaintiffs’ motion, the District of Kansas emphasized the critical importance of a Rule 30(b)(6) notice, concluding that “to allow the Rule to effectively function, the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute.” *Sprint Communications Co., L.P. v. Theglobe.com, Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006). Here, however, Plaintiffs have **never** noticed a deposition requiring the Cargill Defendants’ to identify “a knowledgeable 30(b)(6) designee concerning the scope of the search and nature of [the Cargill Defendants’] document production.” (Pls.’s Mot. Compel at 1.) Rather, Plaintiffs’ notices designated a category of persons to be deposed (records custodians) and so failed to comply with Rule 30(b)(6). The motion to compel likewise fails because the Cargill Defendants have not been “notified as to the reasonably particularized areas of inquiry” that Plaintiffs seek. *See Sprint*, 236 F.R.D. at 528.

Although Plaintiffs seek an Order allowing them to pursue a deposition on the topics of the Cargill Defendants’ “search” for and “production” of documents responsive to their requests, the actual notices at issue are devoid of any reference to document collection and production. To grant Plaintiffs’ motion to compel with this procedural background would be to permit Plaintiffs

both to usurp the Cargill Defendants' right to designate the categories of persons who will testify on behalf of their organizations and to unilaterally expand the subject matter covered by the purported Rule 30(b)(6) notice to areas not described with the particularity required by the Rules.<sup>2</sup>

## **II. PLAINTIFFS SEEK INFORMATION COMPLETELY OUTSIDE THE SCOPE OF DISCOVERY.**

Assuming Plaintiffs had served the Cargill Defendants with proper Rule 30(b)(6) notices designating as topics the Cargill Defendants' efforts to search for and produce responsive documents, Plaintiffs' motion to compel should still be denied because such a notice would surpass the bounds of permitted discovery. While the presence or availability of documents responsive to Plaintiffs' discovery requests may be an appropriate topic for discovery, the method or manner in which the Cargill Defendants chose to respond to Plaintiffs' discovery requests – including efforts to identify, collect, and produce responsive documents – is not relevant to any claim or defense in this case.

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<sup>2</sup> Since Plaintiffs made known their desire to pursue the noticed depositions as Rule 30(b)(6) depositions on document search and production rather than the stated records custodians depositions, the Cargill Defendants have in multiple and detailed correspondence repeatedly explained the dangers that this proposal inappropriately sought the mental impressions of the Cargill Defendants' legal team. (*See* Exs. E-H: Ex. E, March 14; Ex. D, March 16; Ex. F, May 4; Ex. G, May 17 (without attachments); and Ex. H, May 23, 2007 Letters of D. Mann to R. Garren.) The Cargill Defendants repetitively offered "other mechanisms through which the State can ascertain the completeness of the Cargill Defendants' production which do not invade privilege." (*See, e.g.*, Ex. G) Plaintiffs' response to the Cargill Defendants efforts is summed up in their letter of May 21, 2007. (Ex. I) Plaintiffs' reasoning in its entirety: "We disagree." Ex. J.

Despite the Cargill Defendants' requests, Plaintiffs were unable to provide **any** legal authority of any type to support their position during the meet and confer process. Plaintiffs' total lack of legal support contrasted with the thorough analysis and case law provided to Plaintiffs by the Cargill Defendants meant that the meet and confer conference was doomed from the start to be, at best, a pro forma exercise. For the first time, now in the context of their motion to compel, Plaintiffs offer legal authority for their deposition demands. However, as shown herein, the authority cited by Plaintiffs is inapplicable to the issues raised in this motion.

The Federal Rules of Civil Procedure contemplate liberal discovery, but the information sought still must be “reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1); *see also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Hence, Rule 26(b)(1) specifically limits the scope of discovery to “any matter, not privileged, that is relevant to a claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.” Plaintiffs’ deposition notices, however, do not seek information regarding the “existence, description, nature, custody, condition and location” of the Cargill Defendants’ responsive documents. Instead, Plaintiffs’ demand focuses on the manner in which the Cargill Defendants **searched** for and **produced** documents they deemed responsive to the discovery requests.

This case is about alleged environmental harm to the Illinois River Watershed arising from the land application of poultry litter. Fundamentally, this Court must evaluate whether it will keep this litigation’s discovery centered on the sufficiency and completeness of the production of information relevant to the parties’ claims and defenses. Information “concerning the scope of the search and nature of [] document production” performed during litigation by the Cargill Defendants is **not** relevant to any claim or defense by any party. Nothing in the processes undertaken by the Cargill Defendants to identify, collect, and produce responsive documents or to whom the Cargill Defendants or their attorneys spoke, where they looked, and what decisions they ultimately made about searching for and producing documents, is relevant to the claim or defense of any party in this environmental litigation. Nor are those processes particularly relevant to whether responsive documents actually exist or where such documents

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are located. Hence, the deposition demand seeks material outside the scope of discovery permissible under Rule 26(b)(1).

In March 16, 2007 meet and confer correspondence with Plaintiffs, the Cargill Defendants briefly outlined the process undertaken to respond to Plaintiffs' discovery requests:

Upon receipt of service of the State's July 10, 2006 document requests, counsel for Cargill reviewed the document requests and developed a plan for identifying and producing responsive documents, subject to any applicable objections. The actual effort to locate, collect and produce responsive documents was not just guided or assisted by counsel, but was in fact handled directly by counsel in communication with numerous Cargill employees and visits to various Cargill facilities to identify, gather and copy documents. These documents were then reviewed by counsel both for responsiveness to the State's requests and for content to which Cargill objected to producing for the reasons stated in Cargill's Responses to the State's July 10, 2006 Set of Requests for Production of Documents. Because all of these activities took place in the context of counsel rendering legal advice to Cargill during litigation, they are indisputably protected by both the attorney-client privilege and work product doctrine.

(Ex. D at 2-3.) Similarly, Ms. Roe testified in her deposition that the process of identifying, collecting, and producing documents responsive to Plaintiffs' requests was conducted by legal counsel for the Cargill Defendants in consultation with various Cargill employees. (Pls.' Mot. Compel Ex. C at P. 77, Lns. 14-22; P. 78, Ln. 18 – P. 79, L. 4; and P. 102, Lns. 9-11.) Although informed of the process undertaken by the Cargill Defendants to respond to their requests, Plaintiffs' motion offers no explanation as to how such a deposition would yield information relevant to a claim or defense in this action. One of the few cases cited in Plaintiffs' Motion, *Sprint Communications Co.*, however, is instructive on this point, however. *Sprint* was a patent infringement action, in which the subject matter of the Rule 30(b)(6) notice at issue – information regarding the prosecution of the patents-in-suit and their amendments – was directly relevant to both the claims and defenses of the parties in that case. See 236 F.R.D. at 528.

Conversely, here, the subject of the deposition testimony sought by Plaintiffs does not bear on the claims and defenses in this environmental action. Regardless the faulty notice employed by Plaintiffs, because they cannot properly seek testimony outside the bounds of relevance the Court should deny their motion to compel on the merits.

Also, if the true intent of Plaintiffs' demanded deposition is to ascertain the completeness of the Cargill Defendants' production, this information can be readily obtained by comparing the documents and information provided by the Cargill Defendants to information elicited by deposing the identified records custodians. As noted above, in addition to producing documents as kept in the ordinary course of business, the Cargill Defendants provided Plaintiffs with a detailed spreadsheet that denotes *by Bates number* a description of the documents produced, the location from which the documents were obtained down to the file folder level where available, and the document requests to which each document corresponds. (Ex. C) As demonstrated by Ms. Roe's deposition, the Cargill Defendants' records custodians can identify categories and locations of the responsive documents of which they are aware.

110. 11 Q. (Mr. Garren continued.) Miss Roe, I have taken the  
 12 Exhibit No. 1 and opened it to Request No. 51 through 53.  
 13 A. Okay.  
 14 Q. I'd ask you to look at those three requests. After  
 15 you've read them, let me know, and we'll ask you some  
 16 questions.  
 17 (Wherein, witness looks at document.)  
 18 A. Okay.  
 19 Q. With regard to those three requests, are you aware  
 20 of any records that are maintained at the Springdale  
 21 offices that would be responsive to those requests?  
 22 A. No, I do not.  
 23 Q. Are you aware of any records that would be  
 24 responsive to Requests 51 through 53 that are maintained  
 25 at the feed mill?  
 111. 1 A. No, I'm not.  
 2 Q. And are you aware of any records that may be  
 3 maintained at the processing plant that would be

4 responsive to 51 through 53?

5 A. No, I'm not.

6 Q. Are you aware of whether or not the hatchery would  
7 have any records that are responsive to Request 51 through  
8 53?

9 A. No, I'm not.

10 Q. Just so I'm clear, would the processing plant have  
11 any records responsive to 51 through 53?

12 A. I would not know.

(Pls.' Mot. Compel Ex. C at 110-11.) At this point, Plaintiffs abruptly terminated this line of questioning. In this particular instance, Ms. Roe was not aware of any documents at Cargill's feed mill, processing plant, or hatchery that would respond to Plaintiffs' requests nos. 51-53. Unfortunately, Plaintiffs pursued this line of questioning only as to their requests regarding disposal and land application of litter, neither of which fall within the purview of the records Ms. Roe maintains. However, Plaintiffs are free to pursue this sort of questioning with the other identified records custodians, but have simply chosen not to.

### **III. PLAINTIFFS' REQUEST IMPERMISSIBLY INVADES OPINION WORK PRODUCT.**

Should the Court construe the notices to comply with Rule 30(b)(6) or should Plaintiffs re-cast and re-serve the notices under Rule 30(b)(6), and should the Court find the demand for testimony "concerning the scope of the search and nature of [the Cargill Defendants'] document production" in this litigation seeks some relevant information, Plaintiffs' demand is improper because it invades work product protection and attorney-client privilege. The Cargill Defendants are unable to designate for deposition any person with (a) knowledge of the State's July 10, 2006 Set of Requests for Production of Documents and (b) the ability to testify regarding the efforts undertaken by Cargill to locate and produce documents responsive to that request because all of these activities took place in the context of counsel rendering legal advice during litigation. The Federal Rules specifically carve out information created for purposes of litigation and

communications from counsel concerning litigation, protecting such information from routine disclosure. Indeed, opinion work product is so staunchly protected by the Federal Courts that Plaintiffs' motion fails on its face.

The attorney-client privilege is based upon the principle that sound legal advice or advocacy depends upon the lawyer being fully informed by the client. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Distinctly different is the work product qualified privilege, which protects "the vitality and efficacy of the adversarial process by precluding an opposing party from co-opting 'the wits' of his adversary, and by providing privacy in which an attorney may develop litigation strategy and tactics without fear of premature discovery." *Trujillo v. Bd. of Educ. of the Albuquerque Pub. Sch.*, 2007 WL 1306593 (D.N.M. Mar. 12, 2007); *see also In re Qwest Commc'ns, Inc.*, 450 F.3d 1179, 1186 (10th Cir. 2006) (recognizing that "it is essential that a lawyer work with a certain degree of privacy.").

Federal Rule of Civil Procedure 26(b)(3) governs the qualified immunity from discovery for work product materials, which are defined as (1) documents or tangible things (2) prepared in anticipation of litigation or for trial (3) by or for another party or by or for that other party's representative. Because the privilege is qualified, a court may order work product to be disclosed:

**only** upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Fed. R. Civ. P. 26(b)(3) (emphasis added). "Opinion work product" – which includes mental impressions, conclusions, opinions, and legal theories of an attorney regarding the litigation – "enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances." *Snowden v. Connaught Lab., Inc.*, 137 F.R.D. 325, 332 (D. Kan. 1991)

(quotation omitted); *see also United States v. Nobles*, 422 U.S. 225, 238 (1975) (“At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.”) Work product materials are so highly guarded by the courts, that, for example, disclosure of some documents does not destroy work product protection for other documents of the same character, and disclosure of a document to a third person does not waive work product immunity unless the waiver has substantially increased the opportunity for potential adversaries to obtain the information. *See Wright, Miller & Marcus, Fed. Practice & P. § 2024* (Civ. 2d 2003) (*citing, e.g., Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 338 (C.D.N.Y. 1969), “The work-product privilege should not be deemed waived unless the disclosure is inconsistent with maintaining secrecy from possible adversaries.”).

Here, Plaintiffs seek to depose a corporate representative to determine how the Cargill Defendants’ attorneys devised their responses to Plaintiffs’ requests for production. They assert that it is necessary to depose either a member of the legal team or a person educated with knowledge from the legal team to test the completeness of the Cargill Defendants’ discovery responses. Regardless whether the deponent would be an attorney or educated by an attorney for purposes of testifying, Plaintiffs improperly seek protected information. Regardless whether the State’s notices were properly served under Rule 30(b)(1) or Rule 30(b)(6), it is not incumbent upon the Cargill Defendants under the Federal Rules to require any employee to familiarize themselves with a legal document they would not otherwise encounter in the course of their job responsibilities so that Plaintiffs can inquire about that document. Nor is it incumbent upon the Cargill Defendants to require their employees to educate themselves on the reasoning and actions

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of counsel just so Plaintiffs can attempt to find out what counsel has or has not done in responding to their requests and why.

Such a requirement would eviscerate work product and attorney-client privilege. Hence, there is no burden to designate a witness to respond to 30(b)(6) topics designed to uncover privileged communications or attorney work product. *See Sprint Comm'ns.*, 236 F.R.D. at 529 n.19 (citing Central District of New York case for proposition that corporation could refuse to name 30(b)(6) representative where subjects in deposition notice did not seek to obtain underlying facts but instead sought confidential communications and mental impressions of in-house and litigation counsel); *In re Indep. Serv. Orgs. Antitrust Litig.*, 168 F.R.D. 651, 654-55 (D. Kan. 1996) (defendant need not respond to 30(b)(6) notice requesting testimony about facts supporting denials and defenses in pleadings as notice was overbroad, inefficient, unduly burdensome, and designated matters inappropriate for Rule 30(b)(6) purposes such as attorney work product and legal opinions and conclusions).

Much of the information sought in Plaintiffs' motion would constitute communications regarding legal strategy and case planning, protected by the attorney-client privilege. All of the information sought was prepared for litigation by or for the opposing party and, thus, constitutes litigation work product under Rule 26(b)(3). Under the strictures of that Rule, Plaintiffs may **only** obtain such information by proving (1) a substantial need for that particular information, **and** (2) an inability without undue hardship to obtain the substantial equivalent by other means. Plaintiffs' motion presents no argument or analysis on this point, and does not attempt to demonstrate the first prong of substantial need for the deposition on the scope of the search and the nature of the Cargill Defendants' document production. *See Fed. R. Civ. P. 26(b)(3).*

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Plaintiffs' suggestion that a non-attorney<sup>3</sup> can be designated and given the "corporate knowledge" necessary to testify is inapposite and totally fails to acknowledge that such education of a deponent would actually necessitate production of opinion work product.

As to the second prong of Rule 26(b)(3), the Cargill Defendants recognize that Plaintiffs are permitted to discover the types of available documents that might be responsive to their discovery requests in an attempt to ascertain whether they received all responsive documents. The only limitation the Cargill Defendants have placed on this effort is that Plaintiffs must proceed in a manner that does not invade privilege. Toward that end:

Cargill has identified key records custodians who will be able to provide the core information sought by the State: the documents in Cargill's possession, custody or control that are responsive to the State's requests. Cargill also offered to the extent additional questions remain after depositing these key records custodians, Cargill will also make available any other record custodian whom the State may identify in the course of the depositions. Further, Cargill will assist the State in identifying additional records custodians upon receiving further direction from the State of the topics or areas it feels have not been addressed by the previously named custodians.

(Ex. D: Mar. 16, 2007 Letter from D. Mann to R. Garren.) Even if regular litigation work product information were at issue, Plaintiffs may not compel such work product without first

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<sup>3</sup> This Court has already ruled upon the issue of attorney depositions. (Doc. No. 1062, granting Att'y Gen. Mot. for Protective Order); *see also Boughton v. Cotter Corp.*, 65 F.3d 823, 829 (10th Cir. 1995). This Court adopted the factors set forth in *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986), limiting depositions of opposing counsel to where the requesting party has shown that: (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.

Applying the first *Shelton* factor, Plaintiffs can test the completeness of the Cargill Defendants' discovery responses via the additional custodian depositions offered by the Cargill Defendants. *See id.* Second, the information sought from a member of the Cargill Defendants' legal team is not relevant and not necessary to determine the completeness of the discovery responses. Further, the Cargill Defendants strenuously object to providing information shielded by the work product doctrine or the attorney-client privilege. *See id.* Third, Plaintiffs have not even attempted to show that the information they seek from the Cargill Defendants' legal team is crucial to the preparation of their case. *See id.* Although the *Shelton* factors are the law of this case, Plaintiffs' motion fails to mention them.

attempting to obtain the substantially equivalent information through less intrusive means. *See* Fed. R. Civ. P. 26(b)(3); *see also Bartlett v. State Farm Ins. Co.*, 206 F.R.D. 623, 629-30 (S.D. Ind. 2002). The Cargill Defendants have repeatedly offered other mechanisms for Plaintiffs to obtain the substantial equivalent of the sought after protected information. Hence, Court should deny the motion.

Further, at the heart of Plaintiffs' request is their desire to discover how the Cargill Defendants' attorneys reached decisions regarding document production in this lawsuit, not a desire to ascertain discoverable documents. Plaintiffs' true intent rings through in their questioning of Ms. Roe, where throughout the course of the deposition Plaintiffs inquired not just into the documents of which Ms. Roe was aware that might respond their requests but also specifically (1) what documents legal counsel searched for, (2) whether legal counsel's search was in any way limited, (3) whether legal counsel made lists of the documents they took, and (4) what documents legal counsel ultimately produced. Because the search and production effort was conducted entirely by legal counsel, Ms. Roe was largely unable to respond to these questions. (*See, e.g.,* Pls.' Mot. Compel Ex. C at 26, 58-59, 79, 100-01.) However, it is clear that if the Cargill Defendants were required to produce a deponent knowledgeable on these issues, each of these topics would breach areas protected by privilege.

Attorneys' mental impressions and strategies concerning discovery in this litigation, including the selection and compilation of responsive documents, are core opinion work product information. *See, e.g., Sporck v. Peil*, 759 F.2d 312, 315-16 (3d Cir. 1985) (identification of selected documents would reveal attorney's selection process, and thus, attorney's mental impressions); *Flaherty v. Seroussi*, 209 F.R.D. 300, 307 (N.D.N.Y. 2002) (selection of newspaper articles by attorneys was privileged because it might reveal attorneys' mental

impressions). How the Cargill Defendants' attorneys selected responsive documents, therefore, constitutes opinion work product. Plaintiffs do not even attempt to make the heightened showing required for the Court to compel such information. Because this is not one of those "very rare and extraordinary circumstances" in which a party has proved that opinion work product should be discoverable, the Court should deny Plaintiffs' motion. *See Snowden*, 137 F.R.D. at 332.

#### **IV. THE MOTION TO COMPEL IS NOT SUPPORTED BY CONTROLLING AUTHORITY.**

Plaintiffs offer only three authorities in their motion to compel. When reviewed in turn, none supports the relief sought: that legal counsel waive work product protection and attorney-client privilege simply because the opposing party wishes to examine counsels' role in responding to discovery, to satisfy itself that the adversary has fully complied with outstanding discovery requests.

Plaintiffs first cite *In re Grand Jury Proceedings (ABC Corp.)*, 473 F. Supp. 2d 201 (D. Mass. 2007), which contains only superficial resemblance to the issues here in dispute. (*See* Pls.' Mot. Compel at 3.) In *ABC Corp.*, the government noticed the deposition of a records custodian to discover information regarding the storage and retention of corporate documents for use in a grand jury proceeding. In response, the corporation hired an outside consultant to act as its custodian of records during the deposition to avoid waiving the entity's Fifth Amendment rights. 473 F. Supp. 2d at 205-06. The District of Massachusetts found that a recent Supreme Court decision called into question the common practice of allowing an outside consultant to serve in this role, and as a result, ordered the corporation to produce a custodian of records to testify. *Id.* The work product doctrine was never invoked by the corporation and never discussed by the court. Accordingly, the case is irrelevant to the motion at hand.

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*In re Universal Service Fund Telephone Billing Practices Litigation*, 232 F.R.D. 669 (D. Kan. 2005), addressed attorney-client privilege and work product protection in the context of an *in camera* review of documents designated as privileged. Plaintiffs suggest that the case supports the proposition that the Cargill Defendants' assessment of which documents were responsive to particular requests for production does not constitute attorney-client privileged communications. (See Pls.' Mot. Compel at 4.) Plaintiffs quote portions of the case that deal explicitly with the issue of attorney-client privileged communications, and do not provide the Court with any analysis regarding work product protections. (*Id.* (citing *In re U.S.F.*, 232 F.R.D. at 675).) Aside from the fact that Plaintiffs disregard the key issue of work product protection, *In re U.S.F.* does not support the specific relief sought by Plaintiffs. The full passage excerpted by Plaintiffs states:

The mere fact that one is an attorney does not render everything he does for or with the client privileged. Minutes of meetings attended by attorneys are not automatically privileged, and business documents sent to attorneys are not automatically protected. Some courts have been influenced by whether the work being performed at the time of the communication required the services of an attorney or could be performed equally well by a non-lawyer. The fact that the client chose to channel the work through an attorney rather than perform the work with non-legal personnel does not provide the basis for a claim of privilege. Also, the privilege does not apply when an attorney is merely acting as a conduit for information.

232 F.R.D. at 675 (footnote omitted). The District of Kansas was concerned with traditional overbroad assertions of privilege that attempt to cloak the ordinary business of a company with attorney-client privilege, rather than an improper demand to depose a corporate designee on opinion work product regarding the scope and nature of a document search conducted in litigation.

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Plaintiffs also rely upon the District of Kansas's recent decision in *Sprint Communications*, 236 F.R.D. at 528-29. (Pls.' Mot. Compel at 4.) This dispute differs in critical ways from that described in the *Sprint* patent infringement case; most importantly, that case dealt exclusively with attorney-client privilege rather than litigation work product. The deposition notice at issue sought a designee on the corporation's "preparation and filing" of each patent at issue and amendments to those patents, and the only persons with such firsthand knowledge were patent attorneys. *Id.* The District of Kansas recognized the "onerous" burden on the responding party to prepare a corporate representative to testify as to such a traditionally privileged area without waiving attorney-client privilege. *Id.* at 529 (reminding corporation to "exercise caution in preparing the witness or witnesses with privileged information or documents, otherwise the privilege may be waived"). However, in *Sprint*, the resisting party failed to provide more than a blanket assertion that it would be unable to provide any non-privileged information in a Rule 30(b)(6) deposition. *Id.* Work product protection was not at issue because the moving party sought information regarding only the prosecution of the patents, rather than any litigation of the same. The court, thus, required the corporation to educate a non-lawyer to testify as to **facts** communicated to an attorney during the patents' prosecution, which are not protected by the attorney-client privilege. *Id.* Nonetheless, the court recognized that even in this non-litigation context, "it is conceivable that every relevant piece of information regarding 'preparing, filing and revising' Sprint's Patents could be found as privileged and protected communications." *Id.*

The Cargill Defendants' production of a designee, even if educated as directed by *Sprint*, would result in a deponent unable to testify as to anything of substance because Plaintiffs' demand as set forth in their motion goes directly to litigation and opinion work product

information, along with attorney-client privileged information. Hence, the attorney-client privilege analysis in *Sprint* does not control.

### CONCLUSION

The Court should deny Plaintiffs' motion to compel. The Cargill Defendants have undergone extensive and thorough document production. Plaintiffs never noticed the Rule 30(b)(6) deposition they seek from this Court, and the information sought is outside the bounds of relevant discovery. Even if Plaintiffs' generic notices comported with Rule 30(b)(6) and the information sought were relevant, such information would still constitute work product. Plaintiffs have not even attempted to show the required substantial need for discovering the Cargill Defendants' litigation work product or that other less intrusive means, which were offered by the Cargill Defendants, would not yield the information. Further, the motion actually seeks opinion work product that may only be compelled in the rarest of circumstances.

!

Respectfully submitted,

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